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No. 86-1847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIM EDGAR,
Secretary of State,
State of Illinois,

Petitioner,

v.

MCVEY TRUCKING, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether Congress may abrogate the Eleventh Amendment pursuant to its Constitutional authority under Article I, §8, cl. 4 of the Constitution of the United States of America?

II. Whether Congress, in §§ 547(b), 106(c) and 101(21) of the Bankruptcy Code, 11 *U.S.C.* §§ 101(21), 106(c) and 547(b), specifically waived the Eleventh Amendment immunity of the State of Illinois?

PARTIES

The petitioner properly stated the parties, except that McVey Trucking, Inc., Respondent, is an Indiana corporation, is not publicly owned, is not the subsidiary of any other corporation, partnership or enterprise, and is not the parent corporation to any subsidiaries.

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McVey Trucking, Inc. Respondent, respectfully submits this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit requesting that the petition be denied.

OPINIONS BELOW

The petition adequately sets forth the opinions of the lower courts in its Appendix. Reference to the opinions below in this brief shall be to the appropriate page of the Appendix contained in the petition and designated as "App. __".

JURISDICTION

The petition adequately sets forth the jurisdictional grounds of this court.

CONSTITUTION

Article 1, §8, cl. 4 of the *Constitution of the United States* states that Congress shall have the power:

> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

STATUTES

The petition adequately states the pertinent provisions of §§106(c) and 547(b) of the Bankruptcy Code. 11 *U.S.C.* §§106(c) and 547(b).

Section 101(21), of the Bankruptcy Code, 11 *U.S.C.* §101(21) (1982), states:

> 'governmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

STATEMENT OF THE CASE

The petition adequately sets forth the statement of the case, except wherein the petition implies that the Seventh Circuit was unclear of the test to be applied in this case (Petition, p.5). The Seventh Circuit quite

clearly sets forth the test established by this Court and based its decision thereon utilizing the clear language of the three pertinent sections of the Bankruptcy Code, to-wit: 11 *U.S.C.* §§547(b), 106(c) and 101(21).

REASONS FOR NOT GRANTING THE PETITION

I. ARTICLE I, §8, CL.4 OF THE CONSTITUTION OF THE UNITED STATES GRANTS CONGRESS AUTHORITY TO MAKE A STATE AMENABLE TO SUIT.

The Seventh Circuit considered the issue before the court in a two-step approach. First, it found that Congress has the authority under the Constitution to abrogate State immunity to suit pursuant to its Article I powers. (App. A-22). The Court then found that Congress exercised that authority in the Bankruptcy Code, specifically creating 'a cause of action for money damages enforceable against a state in federal court.' (App. A-30).

Article I, §8, cl.4 of the *Constitution of the United States of America*, provides in pertinent part, that Congress has the authority to establish " . . . uniform laws on the subject of bankruptcies throughout the United States." This Court has long held that Congress has constitutional authority to grant the bankruptcy court power to deal with the monetary interest of an unconsenting state. *Gardner v. New Jersey*, 329 U.S. 565, 578, 91 L.Ed. 504, 517, 67 S.Ct. 467, 474 (1946); *Van Huffel v. Harkelrode*, 284 U.S. 225, 76 L.Ed. 256, 52 S.Ct. 115 (1931).

Also, the courts of appeals of the individual circuits have traditionally applied "plenary powers" to different sections of Article I reflecting constitutional

authority in Congress to abrogate the eleventh amendment immunity of a State. For example, the Seventh Circuit, in the case of *Jennings v. Illinois Office of Education*, 589 F.2d 935 (1979), *cert. denied*, 441 U.S. 967, 60 L.Ed.2d 1073, 99 S.Ct. 2417 (1979), held that Congress properly exercised its legislative authority which is plenary within the terms of the constitutional "war powers" grant, thus making Illinois amenable to a federal damage action.

The Fifth Circuit found that Congress had authority in *Peel v. Florida Dept. of Transportation*, 600 F.2d 1070 (1979) to allow a federal court to enter a money judgment pursuant to Article I, §8, stating at 600 F.2d 1080:

> A more consistent rationale is that a state consents to private damage actions when Congress manifests a sufficient purpose to abrogate a state's immunity. Under this approach, the state waived its immunity from suit in federal court at the same time it surrendered its sovereign immunity and gave Congress the power to legislate under delegated powers. As recognized by Chief Justice Hughes in an early case involving sovereign immunity, "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.' " *Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 748, 78 L.Ed. 1282 (1934) (quoting the Federalist No. 81 (A. Hamilton)) (footnote omitted). This rationale removes the

> eleventh amendment as a bar whenever Congress validly has exercised its powers.

The Third Circuit relied on *Jennings* and *Peel* when it held in *Gardner v. Commonwealth of Pennsylvania, Department of Public Welfare*, 685 F.2d 106 (1982), *cert. denied*, 490 U.S. 1092, 103 S.Ct. 580 (1982), at page 109, that: "If Congress intends to bind the State by a cause of action arising under federal law, the eleventh amendment is no bar."

In the case at bar, the Seventh Circuit followed firmly established principals of law which enable Congress, pursuant to Constitutional authority, to abrogate State immunity to suit within the Bankruptcy Code. The Seventh Circuit did not expand Congressional authority as argued by the petitioner. The court of appeals made its ruling based upon the established principals of law of this Court, the several circuits, and the Constitution. There is no question for review by this Court with regard to congressional authority to abrogate state immunity.

II. THE COURT OF APPEALS PROPERLY FOUND SPECIFIC AND UNEQUIVOCABLE LANGUAGE WITHIN SECTIONS 547(b), 106(c) AND 101(21) OF THE BANKRUPTCY CODE WHICH ABROGATES STATE IMMUNITY TO SUIT FOR MONEY DAMAGES.

Since the Constitution grants Congress authority to abrogate state immunity to suit, and the right to pass laws on ". . . the subject of bankruptcies . . .", then Congress must specifically state that abrogation within the statute so that the federal courts may be certain of Congress' intent. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-452, 49 L.Ed.2d 614, 96 S.Ct. 2666 (1976).

The Seventh Circuit followed this principle of looking at the statute for clear congressional intent to make the States amendable to suit. The court succinctly reasoned that:

> In the present case, our inquiry begins with the clear language of the statute. Section 547(b) provides that a debtor in possession may bring suit in federal court to 'avoid any transfer of an interest in property . . . to or for the benefit of a creditor.' 11 U.S.C. § 547(b) (1982 & 1985 Supp.). Section 106(c) of the Code, 11 U.S.C. § 106(c) (1982), makes unmistakeably clear that 'a provision of [the Bankruptcy Code] that contains "creditor" . . . applies to governmental units and . . . a determination by the court of an issue arising under such a provision binds governmental units.' *Id.* Section 101(21) of the Code, 11 U.S.C. § 101(21) (1982), further defines a 'governmental unit' to include a 'State.' *Id.* (App. A-27). (Footnotes omitted).

The petitioner misinterprets the requirement that the waiver of state immunity be within the statute, arguing that each section of the statute must contain that waiver. This creates ludicrous inefficiencies and redundancies in legislative drafting. In a time in which the Courts, Congress, the public and common sense demands less verbosity, the State argues for an explosion of paper and words. The Seventh Circuit deals with this argument stating:

> The Secretary of State correctly observes that § 547(b) does not itself use the word 'State'. However, in seeking to construe a statute, we do not view any provision

> in isolation. Rather, we seek to understand a given provision by determining how it fits into the larger statute of which it is a part. *See*, e.g., *Water Quality Ass'n v. United States*, 795 F.2d 1303, 1306-08 (7th Cir. 1986). The Supreme Court has only recently reminded us of the importance of taking such an integrated view when interpreting the Bankruptcy Code. *See Kelly v. Robinson*, 107 S.Ct. 353, 358 (1986). We see no reason to depart from that approach in this case. There is no reason to conclude that Congress' decision to employ general definitions in § 101(21) and § 106(c), and to make these definitions applicable to numerous specific provisions, including § 547(b), renders the statute constitutionally inadequate. On the contrary, the express language of the statute, standing alone, is sufficient to make us 'certain' that Congress intended to create a cause of action against a state. (App. A-28).

It is clear that the court of appeals correctly found that Congress specifically and unequivocably annulled the eleventh amendment immunity of the State by enactment of §§ 106(c) and 101(21) of the Bankruptcy Code and in § 547(b) granted a cause of action in federal court for money damages against a state. (App. A-30).

CONCLUSION

Petitioner fails to show any important or special reason for this Court to review the rulings of the Seventh Circuit. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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